ACTIO DE IN REM VERSO IN ENGLISH LAW

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LORD Wright while describing Quasi-Contract said: 'Law is bound to provide remedies for unjust enrichment or unjust benefit, that is, to prevent one from retaining the money of, or some benefit, derived from, another which is against conscience that he should keep. Such remedies in English Law are generally different from those in contract or tort, and now fall in a third category of Common Law called Quasi-Contract or Restitution'.

Chitty on Contracts says that: Precedents deal with diverse situations, but they involve a special relationship between two persons where the law imposes a duty on one to pay a sum of money or (exceptionally) to deliver specific property to another. The underlying aim of the precedents seems to be compulsion of the defendant to make restitution of a benefit which he ought not in justice to retain at the expense of the plaintiff. A quasi-contractual situation resembles a contractual one in that liability is imposed upon a particular person to pay money to another, yet it differs in that quasi-contractual liability is imposed by law irrespective of the agreement of the parties. Liability in quasi-contracts is not necessarily based on any 'wrong' (tort) committed by the defendant.

'Indebitatus assumpsit' which was the remedy for breaches of contract in order to enforce consensual obligations, became a complete alternative to the old writ of debt, and inherited the wide scope of debt over not only consensual obligation but also some obligations classified in modern law as quasi-contractual.

'Account' came to be used to recover money paid under a mistake or money paid for a consideration which had wholly failed. This is like our 'Indebiti Solutio'.

However, in England, the Common Law was not alone in providing a remedy for unjustified enrichment. Equity independently developed some principles which are aimed at the same result, viz., to force one disgorge property in his possession which rightly 'belong' to the plaintiff. Equity employed two methods:

1. 'constructive' trust, by which one was deemed to be a trustee of the property for the plaintiff, so that all the remedies of the law of trusts were available to enable the plaintiff as beneficiary to recover what was due to him.

2. By the mechanism of a tracing order, property in the wrong hands could be 'followed' or 'traced' by the true owner despite changes or admixture of the property. In U.S.A. these two principles of Common Law and equity were amalgamated into the topic called 'Restitution'. English lawyers are now aware of the interrelation of law and equity in quasi-contract and restitution.

The theoretical basis of quasi-contractual liability was for many years controversial. Two main theories are considered:

1. Unjustified Enrichment; and
2. Implied Contract Theory.

1. In 1760 Lord Mansfield called the principle of Unjustified Enrichment 'an equitable action to cover back money which ought not in justice to be kept'. It lies for money which, 'ex aequo et bono', the defendant ought to refund; this lies for money paid by mistake, or upon a consideration which happens to fail or for money got through imposition or extortion, or oppression; or an undue advantage taken of the plaintiff's situation. 'The defendant, upon the circumstances of the case is obliged by the ties of natural justice and equity to refund the money'. The equity here referred to is the 'ius naturale' of the Roman Law, that is, Natural Justice.

The 'unjust benefit' theory has been criticised on the ground that the test of natural justice is too vague. But there is

ılready a considerable body of case law ealing with categories of quasi-contract, nd judges follow the existing precedents, /hich cover most of the likely problems of estitution.

Goff & Jones, authors of 'Restitution in nglish Law', accept the principle of unust enrichment. They say that the law olds that: it is unjust to allow the defenlant to retain a benefit received at the laintiff's expense e.g. 'the benefit must ot have been conferred officiously or conerred in submission to an honest claim, or "as an out-and out gift"'. Restitution ill not be awarded if such an award would ead to the indirect enforcement of a tranaction which the law refuses to enforce; estitution will not be awarded to enable ne to make a profit out of his own wrong. he claimant must put the other party back ıto his original position. It is submitted, owever, that the 'unjust benefit' theory ıould be regarded as the correct theoretial principle of Restitution and of quasiontractual liability, since the alternative ow to be considered, is obviously inadeıate.

2. The Implied Contract Theory derives om the fact that previously a contractual medy had been used to obtain restitution f money had and received, but in that acon (indebitatus assumpsit) there was the otion of a promise to pay. This section as abrogated in 1852 Common Law Proedure Act.

This theory, however, is greatly critised because it fails to show in what cirumstances the law imposes Quasi-conactual Liability.

In English Case Law there seems to be *classification of actions* between:

1. 'RESTITUTION', where the defendant is bliged to restore or pay for a benefit reeived from the plaintiff, and 'Liability to ccount to Plaintiff' for money received om a third party. As will be seen in the ext paragraph 'Restitution' and our 'Neotiorum Gestio' are similar.

2. 'REIMBURSEMENT' where the defendant is obliged to repay the plaintiff the money paid by the plaintiff to third persons.

3. 'RECOMPENSE' such as 'Quantum Meruit' for services rendered.

4. 'ACCOUNTS STATED'.

These four *actions* will now be dealt with in detail. The FIRST is the ACTION FOR MONEY HAD AND RECEIVED BY THE DEFENDANT TO THE PLAINTIFF'S USE, i.e. RESTITUTION:

This is an action for money had and received by the defendant to the use of the plaintiff when the plaintiff has paid money to the defendant under certain specified circumstances. The cases for Restitution include:

(a) An action for recovery of money paid under a MISTAKE OF FACT which must be basic. This must include sheer ignorance of something relevant to the transaction. A case decided so, is: NORWICH UNION FIRE INSURANCE SOCIETY LTD. V. WILLIAM H. PRICE LTD. But, money paid in discharge of a legal obligation is not recoverable even if paid by mistake.

(b) Payment under a MISTAKE OF LAW is usually not recoverable. But if there is something more than a mistake of law, (and there usually is), it is recoverable. In 'HOLT V. MARKHAM' payment was refused. Mistake of Common Law and Equity also falls here.

(c) A MISTAKE OF GENERAL LAW in construction of a written document is considered a mistake of law.

There is an exception to the rule that a mistake of law prevents recovery and this is where a part of an estate has been distributed according to a void testamentary disposition. Again, recovery is missable where payment is made under contract but under a mistake of law, and neither party knew that the payment was illegal. But any fraud, oppression or undue influence gives rise to restitution even if made under a mistake of law.

In 'AIKEN V. SHORT' it was held that for restitution the mistake of fact must be one, which if true, would have made the person liable to pay the money and not merely one

which would make it desirable that he should pay. But in 'KERRISON v. GLYN MILLS, CURRIE & CO.' recovery was allowed although the mistake, had it been true, would not give rise to an obligation to pay.

'LARNER v. L.C.C.' indicates that recovery is permitted where the mistake of fact is fundamental or essential, and that a mistake may be such, even if the supposed fact were true, there would be no legal obligation to make payment.

(d) NEGLIGENCE to see if payment is actually due does not prevent recovery. But recovery is not admissable if the payee by his words and intention induced the payer to act on the belief of the facts represented to him. An ESTOPPEL will cause the action for recovery to cease, and this is a clear case when recovery is not permitted.

Besides these, some writers also include as circumstances which qualify under the heading of Restitution: *a consideration which has wholly failed, and Extortion.*

In the former, absence of consideration is not enough – so, money paid by way of gift, cannot be recovered. But money paid in consideration of the sale and delivery of goods can be recovered if by reason of non-delivery of the goods there is a total failure of the consideration for which the money was paid.

In case of Duress, which may be both physical or moral, and Extortion, the money which is paid, is paid under pressure and is not paid voluntarily. Similarly, that paid in discharge of an illegal demand made 'colore officii', or under pressure or coercion, can be recovered back as not paid volontarily. A mere threat to do what the person threatening is free in law to do cannot amount to sufficient coercion. But some Commonwealth Court decisions hold that a threatened breach of contract is 'practical compulsion', and the victim is allowed to recover.

Also included under this action for Restitution is 'Liability to Account to Plaintiffs for Money Received from a Third Party'.

The SECOND is: ACTIONS FOR MONEY PAID BY THE PLAINTIFF TO THE DEFENDANT'S USE, *i.e.* REIMBURSEMENT:

This is an action for money paid where the plaintiff has under compulsion of law paid money which the defendant was ultimately liable to pay so that the latter obtains the benefit of the payment by the discharge of liability.

In certain situations two persons may be subject to a common legal liability to a third person, but as between themselves one is primarily and the other only secondarily liable to discharge it. If the person secondarily liable pays off the third person, and thereby discharges the common liability, he may recover the amount paid from the person who is ultimately liable.

Sutton & Shannon give this example: If A leaves his goods on the premises of a lessee, with the latter's authority, and they are then distrained by the landlord for non-payment by the lessee of his rent, so that A is legally compelled to pay the rent in order to recover his goods, he can afterwards sue the lessee for the amount paid. Again, where a local authority has a right to demand that a liability be met by either two persons, for instance, to require either a landlord or a tenant to repair drains, then, if the person who is compelled to pay is not responsible as between the two of them, he can recover from the other. Here, one has to show that the defendant was subject to a demand in respect of the same liability as the plaintiff.

The THIRD action: is that on a QUANTUM MERUIT CLAIM, i.e. RECOMPENSE.

Where the defendant is obliged to pay the plaintiff, e.g. for work done, but no specific sum is owing, the plaintiff can recover a reasonable sum. Treitel in his 'Law of Contract' says: 'A party can claim Quantum Meruit for work or goods under a contract which does not provide a specific price, and where the agreement is implied'. Later, he generalises in the words: 'If the plaintiff has a legal right to be paid the Court will award a sum'. Most writers quote the following illustration: where a purchas-

er has bought goods by weight and, owing to a mistake in weighing, has paid for a larger quantity than he has received, he can recover the over-payment in quasi-contract. One who has done work under a contract which is void may be able to obtain payment by way of quasi-contract, through a quantum meruit claim which literally means 'so much as the thing is worth'. This is the right to a *reasonable* remuneration for work done or to a reasonable price for goods delivered. It is a quasi-contractual right arising by virtue of the fact that something has been done by one party on behalf of the other.

It is remarked by Sutton & Shannon that claims on quantum meruit may be either quasi-contractual or contractual, and it is at times not clear to which category a particular claim should be assigned.

The FOURTH action is that: UPON ACCOUNTS STATED:

An account stated is the admission of a sum of money being due from the defendant to the plaintiff. It must be sued upon as a distinct cause of action.

The simplest illustration of an account stated is an ordinary I.O.U. The admission implies a promise to pay and the existing debt furnishes the consideration. The account stated is not conclusive between the parties, and it is always open to the defendant to prove that the account was stated (i.e. that he made the admission), by mistake, or that it was respecting debts void for want of consideration or for illegality. The onus of proof is on the defendant; the plaintiff need only produce his I.O.U. or other admission and is entitled to succeed unless the defendant brings foward evidence in support of his plea.

A rather different type of 'account stated' occurs when parties state items on both sides of the accounts and strike a balance. This is a contractual settlement of their mutual claims; here there is a promise to pay the balance given for consideration on the other side and, therefore, action may be brought on the account stated even if some of the debts were unenforceable or statute barred.

From this one clearly sees that the English Courts have tried to solve this problem as it arose and have evolved a type of classification of actions whereby the person who is prejudiced by another's unjustified enrichment can get some remedy.